IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 33335

CHARLESTON

ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,

Appellants/Plaintiffs,

vs.

From the Circuit Court of
Monongalia County, West Virginia
CIVIL ACTION NO. 01-C-147

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Appellee/Defendant.

BRIEF OF AMICUS CURIAE WEST VIRGINIA ASSOCIATION FOR JUSTICE

Christopher J. Regan, Esquire
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
Phone: (304) 242-8410
Facsimile: (304) 242-3936
Email: cregan@bordaslaw.com
Counsel for West Virginia
Association For Justice

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

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BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
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(740) 695-8141

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BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

I. INTRODUCTION OF AMICUS CURIAE WEST VIRGINIA ASSOCIATION FOR JUSTICE

This amicus brief is submitted on behalf of the West Virginia Association for Justice (hereinafter "WVAJ"), a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia injured and/or harmed by the wrongful conduct of others.

The issue presented in the matter sub judice involves an appeal from an Order reducing a victim's verdict in a tort suit ten-fold as a result of an overbroad and overreaching application of the Medical Professional Liability Act. The issues of law bearing on the proper disposition of this appeal are of substantial interest to the Members of the WVAJ and, more importantly, the clients whom WVAJ Members represent. Accordingly, the WVAJ submits this amicus brief in support of the Plaintiff below.

II. SUMMARY OF THE ARGUMENT

This case represents the latest attempt by medical defendants to overreach in application of the Medical Professional Liability Act. In this particular case, the Respondent conceded that it did not provide health care to Allison Riggs and stipulated that the actions she complained of did not constitute the provision of health care. But Respondent nevertheless contends that the Medical Professional Liability Act applies in some general sense, and therefore immunizes the defendant from an award of damages to a horribly injured little girl that the trial judge found to be "well-supported" by the evidence.

This Court has previously heard medical defendants argue that the MPLA applies to cases alleging fraud (Boggs v. Camden-Clark Memorial Hospital, 216 W.Va. 656 (2004)), sexual assault (Gray v. Mena, 218 W.Va. 564 (2005)), spoliation of evidence (Boggs), and to

ORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
EELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
T. CLAIRSVILLE, OHIO 43950
(740) 695-8141

pharmacies, possibly including such institutions as Wal-Mart or Kroger's (Phillips v. Larry's Drive-In, 2007 WL 1888445, W.Va., June 28 (No. 33194.)). The medical defendants in this case, like those before them, consistently ignore the clear statutory language that limits the application of the MPLA to, as this Court has put it, "medical care providers while they are acting as such," Boggs at 663. This case, like Boggs and Phillips, amounts to simple overreaching, pushing the view that the MPLA is some kind of general amnesty for everything related to health care, instead of a statute passed in derogation of the common law that must construed as written.

In short, medical defendants have consistently attempted to use the MPLA as a statute providing immunity to them personally, no matter what they do or to whom they do it. Since such a reading of the MPLA is inconsistent with its text, this Court's prior precedents, and basic rules of statutory construction, amicus curiae WVAJ respectfully suggests that the decision of the circuit court be REVERSED and that the MPLA again be circumscribed by its express terms.

III. ARGUMENT

A. The MPLA only applies to medical professional liability actions, meaning torts based on health care services rendered or which should have been rendered.

The MPLA has a clearly defined scope established in the statute and recognized repeatedly by this Court. The Act is limited to actions based on the rendering or failure to render health care. As this Court explained in Boggs:

> By the MPLA's own terms, it applies only to "medical professional liability actions," and the Legislature has provided a definition: (i) "Medical professional liability" means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.

ORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
EELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
T. CLAIRSVILLE, OHIO 43950
(740) 695-8141

> W. Va. Code § 55-7B-2(i) (2003). Thus the MPLA can only apply to health care services rendered, or that should have been rendered.

Id. at 662. In this case, it was a stipulated fact that the case does not involve the rendering of health care to a patient. The MPLA can therefore, by definition, have no application.

In Gray v. Mena, the express limitations of the MPLA were reaffirmed as this Court stated, "the special protection granted to health care professionals does not extend to all acts committed by those individuals." Id. at 568 (emphasis supplied). The mere fact that hospital personnel on credentialing boards or acting as hospital CEOs or on administrators happen to be doctors or nurses does not bring them within the terms of the MPLA as the MPLA is not a personal amnesty for everyone in or near the health care industry. Only when doctors and nurses are providing health care to a patient can they utilize the MPLA's limitations on common-law remedies.

In Gray, the key fact leading this Court to suggest that MPLA procedures needed to be followed was the doctor's putatively colorable claim that he was performing a hands-on medical examination of the patient. No such examination or hands-on relationship ever existed between Allison Riggs and the administrators responsible for her injuries and correspondingly, the MPLA has no application.

In Phillips v. Larry's Drive-In, decided just this summer, this Court further elucidated the qualifications necessary for MPLA protection by explaining that the Act protects health care providers in their "hands-on relationship with the patient while they are providing "independent medical treatment." As this Court put it:

> First and foremost, the situation in Short involved a medical care provider who developed a hands-on relationship with the patient. A patient's relationship with a pharmacy is not the equivalent of a doctor-patient relationship. A patient goes to a drug store only after the patient visits a physician and receives a prescription, and then largely to purchase a product. As one court stated,

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
HEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

> In every relationship between a patient and one of the listed health care providers under Indiana Code section 34-18-2-14, independent medical treatment is an important component of the health care provided. This characteristic is lacking in the relationship between a pharmacist and a customer simply requesting that a prescription be dispensed.

Phillips v. Larry's Drive-In, No. 33194, June 28th, 2007 (W.Va.); quoting Kroger Co. v. Estate of Hinders, 773 N.E.2d 303, 306-307 (Ind.Ct.App. 2002). In this case, the Defendant stipulated that the relevant acts did not involve hands-on medical care or any independent medical treatment that was provided to Allison or which should have been provided. The Defendant's own attorney declared:

> One of the important things to understand about this case is that Bonnie McTaggert and Dr. Khakoo had no idea who Allison Riggs was until this lawsuit was filed. Their job at the hospital does not include when you are talking about infection control actually treating individuals.

(August 22, 2006 Trial transcript, pp. 143-44). Furthermore, this aspect of the case was incorporated into an agreed order of the trial court: "individual patient care or treatment by agents jointly employed by WVUH and BOG is not at issue in this case." See Order Approving Partial Settlement with University of West Virginia Board of Trustees at ¶5(e). Certainly the MPLA limitations cannot be applied to defendants who affirmatively disclaim a physician-patient or nurse-patient relationship with the plaintiff!

The failure to maintain a safe general environment in the hospital, whether through fire protection, well-maintained elevators, safe food and cleanliness or good lighting is not a "failure to render health care services," simply because it happens in a hospital. The mere fact that hospital administrators happen to also be qualified nurses or doctors does not mean they are "providing health care" "to a patient" when they hire and fire employees or set facility policies for general safety. If Allison Riggs had suffered from food poisoning

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
HEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

negligently inflicted, she would not be the victim of a failure to "render medical care." Such failures on the part of a health care administration are simply garden-variety torts outside the limited scope of the MPLA. Accordingly, the decision of the Circuit Court should be REVERSED.

B. Extending the MPLA beyond its express terms would violate clearly established rules of statutory construction rooted in our separation of powers that is the key to limited government.

Any statute which is in derogation of the common law is to be strictly construed. The rule of statutory construction has been adhered to so long that the memory of the judiciary does not run to the contrary. The position of WVUH in this case, regrettably adopted by the circuit court, stands this rule on its head, by construing the MPLA not according to what it says, but according to what one might imagine medical providers hope it is – a general immunity.

This Court expounded on the ancient canon of statutory construction that statutes in derogation of the common law are to be strictly construed this summer in Phillips v. Larry's Drive-In:

> [O]ur examination of any portion of the MPLA is guided, at all times, by the recognition that the Act alters the "common law and statutory rights of our citizens to compensation for injury and death[.]" *W.Va. Code*, 55-7B-1. In other words, by its own terms, the entire MPLA is an act designed to be in derogation of the common law. It is a long-standing maxim that "[s]tatutes in derogation of the common law are strictly construed." *Kellar v. James*, 63 W.Va. 139, 59 S.E. 939 (1907). As the leading commentator in statutory construction states:
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> > Statutes which impose duties or burdens or establish rights or provide benefits which were not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

> effect which makes the least rather than the most change in the common law.
>
> Norman J. Singer, 3 *Sutherland Statutory Construction* § 61:1 at 217 (6th Ed. 2001). This Court has similarly concluded that, when interpreting an ambiguous statute that is contrary to the common law, the statute must be given a narrow construction.
>
> . . . .
>
> In light of these authorities, we conclude that, where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law. Furthermore, because *W.Va. Code*, 55-7B-1 specifies that the MPLA was enacted to alter the "common law . . . rights of our citizens to compensation for injury and death," the MPLA is in derogation of the common law and its provisions must generally be given a narrow construction.

Id. Of course, the Circuit Court's Order pre-dates Larry's Drive-In, but it is certainly clear now, if it was not before, that the MPLA must be strictly construed and given no broader scope than its terms require.

The limitation on legislative acts construing the common law is rooted in the early days of American history, wherein the original state legislatures were far quicker to abuse the people's authority than the Founders had anticipated. As Justice Powell remarked, the early state legislatures quickly degenerated into a "tyranny of shifting majorities," confiscating property, interfering with the operations of the judiciary, INS v. Chadha, 462 U.S. 919, 961, 103 S. Ct. 2764, 2789, 77 L. Ed. 2d 317 (1983) (Powell, J., concurring), and "depriving people of common law causes of action for damages." William Nelson, AMERICANIZATION OF THE COMMON LAW 91-92 (1975) (emphasis supplied). Many Revolutionary leaders soon became disillusioned in the 1780's. Jefferson, Madison, Adams, and others decried the "elective Despotism" of America's new elected legislatures. Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, 451-52 (1967).

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
HEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Thus, in order to play their role in our system of governance, courts evolved doctrines designed to protect the people from overreaching by transient majorities and to secure the rights of the people. Rules of construction such as the one being urged on the Court herein are part and parcel of any judiciary's ability to check the legislature and ensure limited government. Without such rules, the common law would quickly yield to the endless popular winds that blow through the legislative chambers.[1]

Amicus curiae WVAJ respectfully submits that the circuit court's Order applying the MPLA is largely free of analysis regarding how administrative functions can come within the MPLA's scope. Indeed, the fact that the circuit court applied the cap sua sponte, without briefing or issuing an order containing conclusions of law, shows that the MPLA's application was more assumed than analyzed below. See Judgment Order at 1-2.

The circuit court's later, boilerplate reference to statutory definitions suggests that as long as a plaintiff is in a hospital and the members of the administration are physicians or nurses, whatever they do is subject to the MPLA. See Order Denying Plaintiff's Motion to Alter or Amend the Judgment in Part at 1-2. But this suggestion that the MPLA is so broad runs squarely into the common law, which survives unless the statutory abrogation is express.

[1] Other measures to check the Legislature also evolved, including the exposition of the certain remedy clauses now found in West Virginia's Constitution, among many other states. John Adams himself proposed, and the Massachusetts Constitutional Convention adopted, in its Constitution of 1780, a guarantee of the right of every person to a remedy for all injuries. Samuel Eliot Morison, THE CONSTITUTION OF MASSACHUSETTS, 40 MASS. L.Q. 1, 6 (1955). Other states followed suit; as Justice Leeson noted, "as constitution writers realized that unrestrained state legislative power was as much a threat to the security of individual rights as unrestrained parliamentary and royal power had been." Smothers, 332 Or. at 105, 23 P.3d at 346, citing Wood, CREATION OF THE AMERICAN REPUBLIC, supra, at 448-49. Presently, the people of 37 states have enshrined the guarantee of a certain remedy in their state constitutions. See Gibson, 185 W. Va. at 222 n.20, 406 S.E.2d at 448 n.20. The certain remedy clause was urged on this Court as an additional ground for relief at the Petition stage, but the Court has at present, elected to defer ruling on its application to situations like Allison's.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Since Boggs and Larry's Drive-In both make it clear that administrative or corporate acts like credentialing or selling prescription drugs do not come within the MPLA, the administrative failures that hurt Allison Riggs likewise remain on the outside looking in.

The MPLA places major limits on the common law rights of West Virginians as the literal decimation of Allison Riggs' recovery shows. Accordingly, it must be narrowly circumscribed by its express terms. As Boggs, and Larry's Drive-In recognize, a mere connection or association with a health care provider or a health care setting simply is not adequate to bring a tort case within the MPLA's narrowly construed terms. Only when health care providers are rendering treatment in the manner described by the Indiana Courts in Kroger Co. v. Estate of Hinders, 773 N.E.2d 303, 306-307 (Ind.Ct.App. 2002), do they come within the terms of the MPLA. Accordingly, the Respondents overreached in claiming the MPLA's benefits in this case, and the order of the Circuit Court should be REVERSED.

C. Extending the MPLA to administrative actions could not possibly further the MPLA's declared statutory purpose.

1. After the declared end to the so-called malpractice crisis, it makes little sense to expand the MPLA beyond its express terms.

The MPLA was enacted amid a publicity campaign meant to suggest that the MPLA was necessary to limit medical malpractice lawsuits to avert a perceived crisis in the availability and cost of professional malpractice insurance for doctors, who might otherwise leave the state. It is worth noting that the West Virginia Insurance Commissioner has declared the "end of the medical malpractice crisis." See Medical Malpractice Report on Insurers with over 5% Market Share, West Virginia offices of the Insurance Commissioner,

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

November 2006. Moreover, in light of the highly speculative nature of the "crisis" in the first place, it makes little sense now to expand the MPLA beyond its terms.

According to the Insurance Commissioner, there is "stability and profitability in the West Virginia Medical Malpractice market. Id. at p.13. The number of claims has dropped by nearly fifty percent (50%) since 2001 (p.18), the number of judgments paid each year is small (p. 19) and there is "no clear pattern of either an increasing number of judgments or a consistent increase in the average paid judgment" (p.20). In fact, the "actual number of settlements over the last four years suggests a steady decline in the number of paid settlements" (p.22). The combined loss ratio in West Virginia is almost half of the national average affording West Virginia insurers substantial operating profits in 2003, 2004 and 2005. Id. at pp.11-12).

Seventy percent (70%) of medical malpractice jury trials end in a zero judgment. Id. at p.19. The jury verdict in the Riggs trial demonstrates the merits of this claim as well as the devastating injuries sustained by Allison Riggs. There is no policy rationale for expanding the MPLA beyond its terms when the "crisis," assuming there ever was one, has certainly passed. The evidence for a "malpractice crisis" was always speculative at best.[2]

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[2] Even insurance industry sources candidly admit that caps of any kind, let alone non-economic caps, are not a dominant factor in the cost of insurance. The Insurance Information Institute, which staunchly supports tort reform for policy reasons, nevertheless views excessive competition and underpricing of insurance during periods of high interest rates as the dominant factor in drastic premium increases. In a post-mortem of the crisis of the mid-1980's, which prompted West Virginia's first limitations on medical malpractice suits, the ones at issue in this case, The Insurance Information Institute's Senior Vice President stated:

> The basic factor behind the large price increases in commercial liability insurance in 1985 and 1986 was a six-year period of intense price competition . . . . This period was triggered by high interest rates, peaking at over 20% a for the prime rate in 1981. The incentive of increased investment income from high interest rates led a period of deep price cutting. The interest rate factor alone would have

ORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
EELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
T. CLAIRSVILLE, OHIO 43950
(740) 695-8141

For example, during the celebrated reprise of the crisis in 2001-03, the facts were at variance with the claimed crisis. Although some physicians may have left West Virginia, more came into the state. See Martha Leonard, "State Has Seen Sharp Increase In Number of Doctors," CHARLESTON GAZETTE, Feb. 25, 2001 (figures provided by the U.S. Census and the West Virginia Board of Medicine reveal that the number of doctors in the state increased by 14.3 percent, from 3,017 in 1990 to 3525 in 2000, while the state's population grew by 0.7 percent). See also U.S. General Accounting Office, Physician Workforce 27 (GAO 04-124, Oct. 2003) (the number of physicians per 100,000 population in West Virginia increased between 1991 and 2001 in both metropolitan and nonmetropolitan areas and among generalists and specialists). The (constantly, now) threatened loss of health care providers in the future is necessarily even more speculative.

A recent study by Weiss Ratings, which evaluates the risk-adjusted performance of financial institutions, including the insurance industry, issued the following conclusions based on its study of malpractice insurance in 50 states: In states with caps, the median annual premium went up by 48.2%, but, surprisingly, in states without caps, the median annual premium increased at a slower clip - by 35.9%. Among the states with caps, only 10.5% experienced flat or declining med mal premiums.

In contrast, among the states without caps, the record was actually better: 18.7% experienced flat or declining premiums. These counter-intuitive findings can lead to only one conclusion: There are other, far more important factors driving the rise in med mal premiums than caps or med mal payouts. Martin D. Weiss, Melissa Cannon, and Stephanie

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caused wide gyrations in the price of liability insurance, absent other considerations of excessive competition and developments in tort law.

Sean F. Mooney, The Liability Crisis In Perspective, 32 VILLANOVA L. REV. 1235, 1244 & n.38 (1987).

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Eakins, Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, arid Availability of Coverage (2003) (emphasis in original). Among the "far more important factors" identified by the study are the business cycle, under-reserving, declining investment income, and the departure of some insurers from the market. Id. at 4.[3]

Of course, WVUH will not leave the state whether there is a crisis or not. But to the extent that the cost of malpractice insurance is believed to remain relevant, it is also significant that professional malpractice insurance generally cover providers for errors or omissions only in rendering health care to patients. Administrative actions such as credentialing, infection control, building safety and corporate management are covered by general liability policies, errors and omissions policies and other insurance products separate from medical malpractice insurance. Rarely do such policies ever cover intentional torts like fraud, sexual assault or spoliation of evidence and therefore, like such torts, there is no policy reason for including the administrative failures that occurred in this case within the MPLA's scope – even assuming the crisis existed in the first place. It would therefore represent manifestly defective public policy to apply the MPLA in this case – Allison Riggs' (and all West Virginians') remedies would have been given away while bringing us nothing in return.

2. Expansion of the MPLA beyond its express limits will only encourage the mischief-making of medical defendants trying to re-mold the MPLA into a general health care industry amnesty.

[3] In a following report the GAO emphasized that important factors that determine insurance premiums are specific to individual states, including insurer market competition, state insurance laws and regulations, state tort refonns other than caps, and the manner in which caps are administered in individual states. U.S. General Accounting Office, Medical Malpractice: Implications of Rising Premiums on Access to Health Care 37 (GAO 03-836, August 2003). The researcher acknowledged, "We could not determine the extent to which premium rates and claims payments across states were attributed only to damage caps or also to these additional factors." Id.

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
HEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

An interesting illustration of the mischief the consistent overreaching on MPLA issues has caused has arisen under Gray v. Mena. In that case, the Plaintiff contended that a doctor has sexually assaulted her in the examination room while purporting to practice medicine. She filed her case without the MPLA's required "certificate of merit" and the case was dismissed under the MPLA. See Gray at 568. Reversing, this Court indicated that the dismissal was improper, but a certificate should be provided as a cautionary measure, since experts might well be needed to untangle whether the doctor was doing his duty or something altogether different on the date in question.[4] The clear import of the Gray ruling is that where application of the MPLA is doubtful, a cautious litigant ought to provide a certificate to be safe. Id. at 569.

The ink was not dry on Gray before medical defendants argued that it vastly increased the scope of the MPLA by finding that it is applicable to sexual assaults by doctors.[5] Of course, Gray said no such thing and certainly no reasonable construction of the MPLA would allow a doctor found to have sexually assaulted his patient to plead its limitations on damages. Unlawful sexual imposition is decidedly not the provision of "health care," nor a failure to provide health care, but rather a crime against a person. But the simple cautionary language in Gray is emboldening medical industry defendants to overreach even more.

[4] Gray at 569 ("We recognize that in the case sub judice, a good faith argument may be made that a claim of assault and battery is clearly a claim of an intentional tort which did not involve health care services rendered or which should have been rendered. Similarly, we recognize that a good faith argument may be made that because the alleged assault and battery occurred in the course of an ostensible medical examination, the Appellant's claim is subject to the pre-suit requirements at issue.")

[5] See e.g. "Second Petition for Appeal" in No. 070578 at 59. "Certainly if some alleged sexual assaults can fall within the statute's definition of "medical professional liability," then so must even the worst misconduct alleged by Plaintiff here."

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
WHEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Amicus curiae respectfully suggests that this Court continue in the line of Boggs and Larry's Drive-In by clearly DECLARING that the MPLA is limited to its terms and cannot be expanded to anything a doctor, nurse or hospital does. The MPLA was not enacted as a general amnesty for torts committed in the health care setting and should not be expanded by this Court to become that at the urging of medical defendants.

D. Grave doubt as to the constitutionality of the MPLA further counsels against an expansive reading of its terms.

Over the past four years, this Court has struck down aspects of the MPLA, in Louk v. Cormier, 218 W.Va. 81 (2005), and it has been required to limit or construe the MPLA in numerous other cases, such as Boggs, Gray, Roy v. D'Amato, 218 W.Va. 692, (2006) and Hinchman v. Gillette, 217 W.Va. 378 (2005), to avoid serious recurring questions as to the constitutionality of the Act. minimum, a situation of grave doubt as to the constitutionality of the MPLA.[6] Under such circumstances, it would seem the wise course to limit this highly questionable statute as much as possible, to avoid the likelihood of an unconstitutional legislative measure depriving a truly wronged Plaintiff like Allison Riggs of her just recovery.

By limiting non-economic damages, the MPLA has always heavily favored the banker over the housewife, the lottery machine owner over the retired coal miner, and the wage earner over our children and our elderly. This case is a clear example of more of the same.

[6] Additionally, a strikingly thorough and well-researched article in the West Virginia Law Review recently pointed out the overwhelming evidence that caps on non-economic damages have no significant impact on malpractice insurance rates. The article further elucidated the ways in which such caps fail to address the perceived problem at immense cost to the most severely injured victims of medical torts. Clearly, clouds of doubt are gathering around this unusual statute. Kotur, Kelly, Student Work, "An Extreme Response or a Necessary Reform? Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates" 108 W.VA. L. REV. 873 (Spring 2006).

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
HEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Allison Riggs' recovery should be decimated under the MPLA, says WVUH, on the statute's evident rationale that if we do not lose wages, we lose little. Our Constitution does not permit a girl's childhood to be esteemed so lightly, or this discrimination against our stay-at-home mothers,our children, our retirees or grandparent to go on indefinitely.

IV. CONCLUSION

WHEREFORE, Amicus curiae, West Virginia Association for Justice, Respectfully PRAYS that this Court will REVERSE the Decision of the Circuit Court reducing the damages awarded by the Jury and REINSTATE the Jury's Award of Damages in its full amount, plus accrued interest and DECLARE the Medical Professional Liability Act inapplicable to cases falling outside its express terms; or, in the alternative, DECLARE the MPLA's cap on non-economic damages UNCONSTITUTIONAL.

Respectfully submitted,

Christopher J. Regan Esq. (WV Bar #8593)
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
Phone: (304) 242-8410
Facsimile: (304) 242-3936
Email: cregan@bordaslaw.com

On behalf of:

West Virginia Association for Justice
Suite 207, Boulevard Towers
1018 Kanawha Boulevard
Charleston, WV 25301

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
HEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 33335

CHARLESTON

ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,

Appellants/Plaintiffs,

vs.

From the Circuit Court of
Monongalia County, West Virginia
CIVIL ACTION NO. 01-C-147

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Appellee/Defendant.

CERTIFICATE OF SERVICE

Service of the foregoing BRIEF OF AMICUS CURIAE was had upon the defendant herein via Fed Ex overnight delivery, on this 10th day of July, 2007, as follows:

Wesley W. Metheney, Esq. (WV State Bar #2538)
WILSON, FRAME, BENNINGER & METHENEY, PLLC
151 Walnut Street
Morgantown, WV 26505

Paul T. Farrell, Jr., Esq. (W. Va. State Bar #7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL
419 Eleventh Street
Post Office Box 2389
Huntington, West Virginia 25724-2389

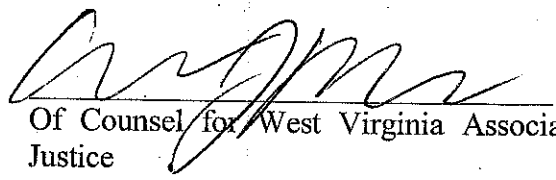
Counsel for Petitioners

BORDAS & BORDAS, PLLC
ATTORNEYS AT LAW
1358 NATIONAL ROAD
HEELING, WEST VIRGINIA 26003
(304) 242-8410

OHIO OFFICE
246 W. MAIN STREET
ST. CLAIRSVILLE, OHIO 43950
(740) 695-8141

Christine Vaglienti, Esq.
WVU Hospitals
P.O. Box 8128
Morgantown, WV 26506-8128

Counsel for Respondent



Of Counsel for West Virginia Association For Justice

Christopher J. Regan
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410